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INCLUSIVE JUSTICE: A CRITICAL ANALYSIS OF GENDER-NEUTRAL RAPE LAWS IN INDIA

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I. ABSTRACT

This paper critically analyses the need for implementing a gender-neutral rape provision in India to encompass the diverse experiences of survivors and perpetrators. The primary aim of this research is to underscore the necessity of transitioning towards gender-neutral rape laws in India. The paper seeks to challenge the antiquated belief that gender plays a role in the determination of parties of sexual violence and instead argues for the law to recognize the varied experiences of individuals without considering gender as a critical factor. Further, this study addresses the changing social mindset and dynamics and its role in a gender-neutral provision. This paper seeks to unveil the limitations of gender-specific laws through a comprehensive review of existing legal frameworks, reports, and judgements. The paper reveals a systemic deficiency in current legal provisions, particularly in acknowledging the experiences of male survivors as well as victims of abusive same-sex relationships and dispelling the restrictive narrative that only women can be victims and only men can be the perpetrators. The results of the study argue that gender-neutral rape laws not only fill a crucial legal gap but also play a pivotal role in shaping societal attitudes towards sexual violence. It seeks to conclude that such a provision would align with the principles of justice and equity as envisaged in the Constitution by providing a legal remedy to all victims regardless of gender.

II. KEYWORDS:

Gender-neutral, India, Justice, Rape, Sexual violence

III. INTRODUCTION:

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The offence of rape has been defined under Section 375[3] of the Indian Penal Code, 1860 and Section 63[4] of the Bharatiya Nyaya Sanhita, 2023 . The Sections read as follows " *A man is said to commit "rape" if he – (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person…"*

At first glance, it is clear that the definition of rape, as per the law, is gender specific. The definition primarily focuses on the male being the perpetrator and the female being the victim. This stems from the colonial belief that such acts can only be done by a male against a female. The definition of rape was broadened after the passing of the Criminal Law Amendment Act, 2013, which classified any bodily penetration as rape and not merely penile-vaginal penetration. The rape law in India has undergone several amendments. However, a gender-neutral approach was never adopted. The gender-neutral approach seeks to dismantle the narrative that rape is a gendered offence and instead recognize the plight of all the victims regardless of their gender. This transition challenges the profoundly ingrained societal understanding of rape and invites a nuanced exploration of its implications on justice delivery and societal attitudes.

In order to constitute the offence of rape, it is necessary that such an offence was committed without the consent of the victim. Consent plays a vital role in the determination of the offence of rape. It aims to protect the bodily integrity of the victim who has not consented to such relations and was subjected to such acts against their will. Section 375[5] provides an expansive definition as to what constitutes rape in order to provide maximum protection to the victim for all kinds of sexual activity done without consent. However, the definition as to the classification of the perpetrator and victim is narrow and gender-specific.

The essence of a gender-neutral rape law would be to provide legal recourse to all victims of such a heinous crime. The definition of rape must evolve with the changing social conditions and values. At this juncture, both homosexual and heterosexual

[3] Indian Penal Code 1860, Section 375
[4] Bharatiya Nyaya Sanhita, 2023, Section 63
[5] Supra note 1

relationships are implicitly recognized under the law as seen in the case of *Supriyo v. Union of India*[6], before the Supreme Court of India, Chief Justice of India Dr. D.Y Chandrachud in his judgement recognized the right to form unions and that the State must accord recognition to such relationships. The recognition of such relationships also puts an obligation on the State to provide due protection to such persons, which form part of their fundamental right to life as enumerated in Article 21[7]. With the changing landscape of civil unions in India, there arises a need for a gender-neutral law to encompass all variations of such a crime and to ensure no person has undue immunity merely on the basis of their gender and the strict definition under the law.

IV. EMERGENCE OF A GENDER-NEUTRAL APPROACH:

With the changing social situations and recognition of such relationships, various countries across the globe, including countries such as the USA, UK, and Canada, have adopted a gender-neutral approach. This evolution has emerged in order to ensure that all victims of such a crime have a remedy under the law. The law must consider the different range of scenarios and gender dynamics and ensure that every person, regardless of gender, has equal protection under the law.

Male rape was first recognized under English law in 1994 when the definition of rape was revised so as to include non-consensual, penile-anal intercourse of a woman or a man[8]. Section 4[9] of the Sexual Offences Act, 2003 provides for penetrative and non-penetrative sexual activity without consent to be an offence under the law. The UK legislature has adopted a gender-neutral approach to the construction of the section wherein the perpetrator is labelled as "*A person*." This indicates the attempt of the legislature to ensure that all victims have protection from their perpetrators and also creates a female equivalent of rape. Further, Section 271[10] of the Canadian Criminal Code, 1985 also incorporates a gender-neutral approach to rape. In the Canadian context, the offence of rape has been replaced with that of sexual assault, which

[6] Supriyo v. Union of India, 2023 SCC OnLine SC 1348
[7] Constitution of India, Article 21
[8] Philip N. S. Rumney, In Defence of Gender Neutrality within Rape, 6 SEATTLE J. SOC. JUST. 481 (2007).
[9] Sexual Offences Act, 2003, S. 4 (UK)
[10] Canadian Criminal Code, 1985, S. 271 (Can)

encompasses rape. The Section reads, "*Everyone who commits a sexual assault is guilty of…*". The use of the term "*everyone*" within the section affirms that the definition is not gender specific and allows anyone to be convicted if found guilty under the law.

This demonstrates the Legislature's willingness to legally recognize and protect victims of sexual assault, including victims of rape, across a wide array of circumstances under which such an act may occur. This allows all individuals to gain protection under the law in such instances.

As per the Criminal Victimization Report of 2019, in Canada, the ratio of male victimization was 59 incidents per 1000 men[11]. Additionally, when controlling for individual characteristics, women, lesbian, gay, or bisexual people, and younger people have a greater likelihood of being violently victimized[12]. As other Canadian victimization surveys have found, sexual orientation is a factor associated with violent victimization, with those who are not heterosexual at greater risk. More precisely, individuals who were not heterosexual were found to have twice the likelihood of being victims of violent crime when other factors were taken into account. This observation underscores the increased vulnerability of LGBTQ+ community members to such offences.

While such persons are granted legal recognition and protection under the Canadian law, the same cannot be said for the Indian law. The broad definition of sexual offences under the UK and Canadian criminal laws allows for the prosecution of such offenders without basing it on the gender of the perpetrator or the victim. Since the incorporation of a gender-neutral approach, these jurisdictions have experienced increased reporting and improved access to justice for all victims. The legal recognition of such victims affords them protection and the objective of the law is to protect all individuals from victimization by considering the diverse situations under which it may occur.

[11] Cotter, Adam. "Criminal Victimization in Canada, 2019." Canadian Centre for Justice and Community Safety Statistics.
[12] *Id.*

At this point, the legal framework in India neglects to address scenarios in which instances of rape involve a female perpetrator targeting another female or a male perpetrator targeting another male. Such situations must be acknowledged to ensure that all victims are recognized under the law. The offence of rape is not merely a physical act; the mental component of such an act must also be considered. It is a complete deprivation of a person's right to bodily integrity. Further, the lack of public acknowledgement and legal protection for such victims has an adverse impact on the ability of the victim to recognize their own victimization[13].

The current social situation in India recognizes LGBTQ+ relations, and when such relations are recognized, the law must also consider the potential occurrence of crimes within these relationships. The law strives to protect all individuals who may be the victim of any violence, and in doing so, it is essential that a particular class of people is not left out merely because of their gender or sexual orientation. The lack of legal recognition and protection also leads the victim to internalize their suffering as they are deprived of the ability to access justice merely because the law adopts a strict construction of the offence of rape. With the changing social landscape, the law must also develop in order to adjust to such changes. One such change is the different types of relations present in society and also the recognition of the fact that perpetrators and victims cannot be put into watertight compartments merely based on gender.

The legislature still holds on to antiquated notions of gender roles and fails to consider the possibility of males being victims or females being perpetrators. This can further be seen in the definition of rape in Section 63[14] of the Bharatiya Nyaya Sanhita, 2023, which replaces the Indian Penal Code 1860. The definition in the new Act continues to display such antiquated beliefs by strictly stating that "*A man is said to commit rape if…*". This implies that the male can be the sole perpetrator, and the female is always the victim. The law fails to recognize the possibility that males can also be victims of other males or females or that females may also be victims of other females. Further, the law does not take into consideration abusive same-sex relationships, and in doing

[13] Supra note 6
[14] Supra note 2

so, it leaves a class of society vulnerable. The legal recognition of such victims would allow them to have access to justice and also provide them with a forum to address their suffering. There is an argument that a gender-neutral law would lead to the perception that the suffering of female victims is being downplayed or marginalized. However, this notion is based on the antiquated beliefs of power structures within society. Further, this does not serve as a sufficient reason to deny a class of people their right to bodily integrity and hinder their access to justice. Instead, the law must consider the positive implications of such a move, as it would lead to enhanced accountability while also attempting to address the stigma and stereotypes attached to such an offence. The law must attempt to adopt a contemporary approach to modern challenges.

The Law Commission of India, in its 172nd report, recommended a gender-neural rape provision and acknowledged the physical and mental effects it may have on a person. Sexual assault laws are often gender specific, and there are arguments for making a gender-specific law gender-neutral. However, it is the duty of the State to ensure that every person's fundamental right to life and personal liberty is not violated. Further, the right to justice is a fundamental right under the Constitution, and justice does not differentiate on the basis of gender roles. The concept of right to life, as enumerated in the Constitution of India, also encompasses the concept of dignity. Any form of sexual violence against any person, regardless of their gender, is a grave violation of their right to live with dignity. The State is duty-bound to secure to its citizens their fundamental rights, and equal protection for all victims of such a crime must be considered as the State's responsibility. While private persons may commit such an offence, that does not relinquish the State of its obligation to protect such rights. The effects of a gender-neutral provision would be far-reaching. Not only would it be a positive step towards the recognition of homosexual relationships, but it would also assist in the eradication of the stigma associated with victims of sexual violence.

V. JUDICIAL INTERPRETATION AND PRECEDENTS:

In the case of *Navtej Singh Johar v. Union of India*[15], the Supreme Court struck down Section 377[16] of the Indian Penal Code, 1860, on the grounds that it was unconstitutional and violated the rights of the LGBTQ+ community by criminalizing even consensual homosexual relations. This judgement paved the way for the acceptance and recognition of this community in the Indian social context. However, it is pertinent to note that while the judgement discussed the criminalization of consensual sexual relations, the possibility of non-consensual relations was never addressed. Prior to it being struck down, this was the only section that provided a remedy to individuals who were victims of non-consensual sexual relations in such a form. The judgement does not address the need for a law to protect non-consensual relations, leaving no recourse under the law. Therefore, there is no available legal remedy to deal with the rape of an adult male by another male or female. Further, there is also no protection for a female victim against a female perpetrator. While the amended definition of rape includes non-penile penetration, the perpetrator can only be a male, and such a narrow application of the law indirectly provides undue immunity to a particular class of people merely based on their gender.

The narrow definition of rape under section 375[17] of the Indian Penal Code, 1860 is a gender-specific definition. As a result of this restricted definition, unless the victim and perpetrator fit into the elements of Section 375[18], they have no avenue for recourse under the law. The same problem is present with the definition of rape as per Section 63[19] of the Bharatiya Nyaya Sanhita, 2023. The judgement of the Supreme Court in the case of *Navtej Singh Johar*[20] was a pressing necessity as Section 377[21] of the Indian Penal Code, 1860 criminalized both consensual and non-consensual relations. However, the lack of recognition for non-consensual relations under the law leaves a class of society vulnerable while also providing undue immunity to another set of offenders. Further, with the changing social dynamics, the law must also consider the varied

[15] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1
[16] Indian Penal Code, 1860 Section 377
[17] Supra note 1
[18] *Id.*
[19] Supra note 2
[20] Supra note 13
[21] Supra note 14

circumstances concerning rape, i.e., it must take into account the various situations under which such a crime may be committed. The current law provides for a single situation wherein the perpetrator and victim are of a particular gender, thereby perpetuating the belief that perpetrators and victims are based on gender stereotypes. This disregards the experiences of a class of society who may also be victims.

The contemporary social environment has embraced a diverse spectrum of relationships, including those within the LGBTQ+ community. With the recognition of such relations, the possibility of offences within such relations must also be accounted for under the law. A gender-neutral approach will encompass all situations and circumstances, thereby providing legal recognition and protection to all parties involved. The lack of a gender-neutral definition perpetuates stereotypes and stigmas surrounding same-sex relationships, as well as the notion of males being victims of sexual offences. This leads to a lack of reporting of such cases as no legal protection is provided to such victims. Fear of discrimination, disbelief, or retaliation often deters individuals from coming forward to report incidents of sexual violence, perpetuating a cycle of silence. An inclusive approach not only aligns with international human rights standards but also reflects a commitment to fostering a safer and more equitable society for everyone. A gender-neutral provision would safeguard individuals of all genders, departing from the traditional notion that only males can be perpetrators and females can be victims. This moves away from historical compartmentalization ensures protection for both males and females, acknowledging the diverse experiences of victims and perpetrators irrespective of gender.

VI. DIVERSE REALITIES AND LEGAL RECOGNITION:

In essence, a model rape definition should have two main components. The perpetrator, as well as the victim, should not be explicitly confined to one gender, and instead, the adoption of the word "any person" would ensure a gender-neutral provision. This would cover not only male-female dynamics but also male-male, female-female, and female-male.

One of the arguments presented against a gender-neutral provision is the lack of reported cases. However, it is pertinent to note that the lack of reported cases cannot

be a valid reason not to afford a certain section of people protection under the law. The lack of reported cases stems from the social stigma attached to the victim of this crime as well as the stigma associated with homosexual relations. The initial definition of rape was drafted during the British era, wherein gender roles in rape were viewed through a lens that reflected traditional and outdated perspectives. Such a belief cannot stand the test of time and the recognition of such relationships by the Courts in India is just the first step of many in this long journey.

Further, the definition of rape is also based on the stereotypical gender roles wherein only males can be perpetrators and females are always the victims. While that may be present in the majority of reported cases, it does not dismiss the plight of the minority in this regard. Protection must be awarded to any victims as the primary purpose of criminal law is deterrence. On the basis of the deterrence theory, crimes are often criminalized in order to deter people from committing such an offence. According to the deterrence theory, the rational calculus of the pain of legal punishment offsets the motivation for the crime (presumed to be constant across offenders but not across offences), thereby deterring criminal activity[22]. The very foundation of criminal law is based on the concept of justice, and justice does not discriminate based on gender. All persons are entitled to certain basic human rights, including the right to live with dignity and bodily integrity.

Multiple countries have transitioned towards a gender-neutral approach to the definition of rape. One such country that has done so is the United Kingdom; this can be seen in Section 4[23] of the Sexual Offences Act, 2003, which deals with penetrative and non-penetrative sexual activity without consent. As per data collected by Survivors UK, a society aimed at supporting men and non-binary people who have been affected by sexual violence, every year, more than 84,000 men, boys, and non-binary people are raped, sexually abused, or sexually assaulted. Further, for the year ending March 2022, the Crime Survey for England and Wales (CSEW) estimated that 798,000 women and 275,000 men aged 16 years and over experienced sexual assault

[22] Akers, Ronald L., "Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken," 81 J. CRIM. L. & CRIMINOLOGY 654, 653-676 (1990)
[23] Supra note 7

(including attempts) in the last year[24]. This prevalence rate is approximately 3 in 100 women and 1 in 100 men[25].

As part of the Crime Survey for England and Wales (CSEW), victims of sexual assault by rape or penetration were asked questions on physical injury and the other non-physical effects they may have experienced. 63% of female victims and 47% of male victims said they had suffered 'mental or emotional problems' as a result of the assault, and around one in ten victims (12% of men and 10% of women) said they had attempted suicide as a result[26].

The Centre for Disease Control and Prevention of the US Department of Health & Human Services has reported that over half of women and almost 1 in 3 men have experienced sexual violence involving physical contact during their lifetimes. 1 in 4 women and about 1 in 26 men have experienced completed or attempted rape. About 1 in 9 men were made to penetrate someone during his lifetime. Additionally, 1 in 3 women and about 1 in 9 men experienced sexual harassment in a public place[27]. From these statistics, it can be observed that there exists a significant number of reported cases of male victims. This statistical data is available primarily because the UK and US have incorporated a gender-neutral approach to the definition of rape that allows male and female victims the opportunity to report the offence. However, statistical data pertaining to India is not readily available due to the lack of legal recognition and protection that prevents victims from reporting the crime out of fear of ridicule and the social stigma attached to it. While women are more likely to experience sexual assault and harassment, the data also demonstrates that men are not immune to sexual violence. A notable proportion of men reported experiences such as completed or attempted rape. This highlights the importance of acknowledging and addressing the experiences of male survivors and ensuring that support services and legal frameworks are inclusive and accessible to all individuals, irrespective of gender.

[24] Office for National Statistics (ONS), released 23 March 2023, ONS website, article, Sexual offences victim characteristics, England and Wales: year ending March 2022
[25] *Id.*
[26] Office for National Statistics (18 March 2021) Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020.
[27] https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html

VII. CONCLUSION:

In conclusion, the journey towards gender-neutral rape laws in India signifies a paradigm shift, challenging ingrained societal beliefs and fostering a more inclusive legal landscape. The evolution of law represents the legislature's willingness to acknowledge the diverse relations and experiences and allow them access to justice regardless of their gender or sexual orientation. It is not merely a legal formality; rather, it is a concerted effort aimed at catalysing societal change. The current approach adopted by the legislature is rooted in the antiquated beliefs associated with gender roles and relations. In addition to disregarding the experiences of male survivors, the absence of gender neutrality feeds into the damaging stereotype that only women may be victims and only males can be aggressors. The ideas of justice, equality, and the safeguarding of individual rights are all compromised by this division.

A gender-neutral approach would uphold the concepts of justice and equality by ensuring that justice is impartial to gender distinctions and is accessible to every victim. The transition to a gender-neutral approach will not only facilitate justice but will also have a far-reaching social impact as it paves the way for the development of the law to eliminate gender bias and protect everyone. Further, the recognition of the plight of male victims as well as victims of same-sex relations will not only reduce the stigma attached to such crimes but also allow them the opportunity to report such crimes. The lack of statistical data regarding offences against these classes is due to the lack of legal recognition provided to such an offence as a result of the strict definition of the offence of rape as per Section 375[28] of the Indian Penal Code, 1860 as well as Section 63[29] of the Bharatiya Nyaya Sanhita, 2023 which shall replace the former. It is pertinent to note that the origin of the definition of rape was a result of the antiquated beliefs present at the time of the framing of the Indian Penal Code, 1860 under British rule. Presently, it is evident that while the original definition of rape was introduced by the British prior to India's independence, Britain itself has also

[28] Supra note 1
[29] Supra note 2

amended its laws and transitioned to a gender-neutral approach, and the same has allowed such victims to report the occurrence of these offences as can be seen from the statistical data previously discussed.

The essence of the argument for a gender-neutral rape law is to rectify a legal oversight while also acknowledging the realities of numerous people who have been isolated and suffered in silence due to the lack of legal recognition and societal pressure. These legal considerations are necessary in order to combat the changing social dynamics and ensure that the law develops with the society. It not only promotes justice and equality but also promotes inclusivity within the society and has the potential to reshape social attitudes towards sexual violence by recognizing the varied experiences of survivors. Additionally, the implementation of gender-neutral laws conforms with overarching objectives of deterrence and prevention. Such a law would ensure that perpetrators can be held accountable for any sexual acts done without the consent of a person, regardless of their gender, thereby ensuring that no one has undue immunity under the law. This shift has the potential not only to deter potential offenders but also to reshape societal attitudes and perceptions surrounding sexual violence. This transition would strive to provide an inclusive society that protects and recognizes the inherent dignity of every individual. The implementation of gender-neutral rape laws is not just a legal necessity; it is a societal imperative that heralds a future where justice knows no gender.

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